


1 the Montana Administrative Procedures Act by filing a petition in the
2 appropriate court within thirty (3) days after service of the Final
3 Order.

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5 DATED this 2nd day of May, 1980

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8 DAVID L. PENGELLY, D.N.R.&C
9 HEARING EXAMINER
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1 Blair, Mrs. Marie E. Greydanus Mrs. Richard Jochinsen, Mr. William D.
2 Lane, Mr. William E. Mytty, Mrs. Sue Umstead, Mr. Gene Whitaker and Mr.
3 Tony Zens. Messrs. Blair, Mytty and Zens were represented by legal
4 Counsel, Mr. George Goodrich, Missoula, Montana. Mr. Goodrich also
5 represented Mr. and Mrs. Eric Skibsted, who were not present at the
6 hearing. Mrs. Greydanus was represented by Counsel, Mr. John F. Patterson,
7 Missoula, Montana. The Montana Power Company objected to Application
8 No. 15,150-s76H but was not represented at the hearing.

9 Those testifying against Application No. 15,150-s76H were Mr.
10 Blair, Mr. Goodrich (on behalf of his clients), Mr. Mytty, Mr. Whitaker
11 and Mr. Zens.

12 Mr. Whitaker introduced three (3) exhibits supporting his objection,
13 to wit:

14 Objector's Exhibits:

- 15 O-1 Photographs (11) depicting diversions and uses of water along
16 the Thayer Ditch.
17 O-2 Assignment of Contract for Deed
18 O-3 Permission to Assign Contract for Deed
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20 The Objector's Exhibits were marked accordingly and received into the
21 record without objections.

22 Montana Department of Natural Resources and Conservation personnel
23 present and testifying on behalf of the Department were: Larry Brown,
24 Hydrologist; Arlin Krogstad, Hearing Representative; and Jan Mack,
25 Missoula Water Rights Bureau Field Office Manager. Also present was
26 Vicki Woodrow, Hearing Recorder. The Department was not represented by
27 legal counsel. Two (2) exhibits were introduced by the Department, to
28 wit:

Department's Exhibits:

D-1 Plat map showing location of Applicant's and Objectors' properties

D-2 Copy of map from Missoula County Water Resources Survey, part 2, page 5, showing location of irrigated lands and irrigation ditches.

The Department's Exhibits were marked accordingly and received into the record without objection.

MOTION

At the Pre-hearing Conference held on November 8, 1979, a motion was made by Mr. George Goodrich, Counsel for several objectors, to deny the Application since the Department had not acted on the Application within the 180 day time limit set under the Montana Water Use Act (85-2-310, MCA, 1979). Motion by Counsel is denied since the purpose of Section 85-2-310 is to protect an Applicant from inaction by the Department, not Objectors.

SUMMARY OF RECORD

1. On September 12, 1977, the Department received an Application for Beneficial Water Use Permit No. 15,150-s76H by Jim and Ethel Prelat to appropriate 5 gallons per minute of water and not to exceed .25 acre-feet per annum from Mill Creek, a tributary of Lolo Creek in Missoula County, Montana. The water is to be diverted from Mill Creek by means of Thayer Ditch at a point in the SW1/4 NW1/4 NE1/4 of Section 3, Township 11 North, Range 21 West, M.P.M., and used for new irrigation on .1 acre, more or less, in the SW1/4 of said Section 35, from June 1 to October 15, inclusive, of each year.

CASE # 15150

1 2. On May 31, June 7 and 14, 1978, the Department caused to be
2 duly published in the Missoulian, Missoula, Montana, notice of Application
3 for Beneficial Water Use Permit No. 15,150-s76H.

4 3. On June 29, 1978, the Department received objections to the
5 above Application from George Goodrich on behalf of Mr. and Mrs. William
6 J. Blair, Mr. and Mrs. William E. Mytty, Jr., Mr. and Mrs. Eric Skibsted,
7 and Mr. Tony Zens.

8 4. On August 2, 1978, the Department received an untimely objection
9 to the above Application from the Montana Power Company. The Montana
10 Power Company was given an extension of time to file since they did not
11 receive individual notice of the above Application.

12 5. On December 13, 1979, Mr. Gene Whitaker was admitted by the
13 Hearing Examiner as an untimely Objector to the above Application.

14 6. Mr. Prelat testified that he would only use water from the
15 ditch when his siphon hose would work. The water would be used to water
16 a lawn and garden. He stated that he wouldn't take any water if it
17 would affect those with prior rights. Mr. Prelat stated under cross-
18 examination that the source of supply is Mill Creek. Mr. Prelat testified
19 that he would not actually divert any water from Mill Creek, he would
20 only take water that came down the Thayer Ditch since he has no control
21 over how much water is diverted into Thayer Ditch from Mill Creek.

22 7. Mr. Whitaker, an Objector, testified that he owns 20.4 acres
23 for which he has a five (5) inch high water right to be used on 10.4
24 acres to be delivered through the Thayer Ditch. Mr. Whitaker further
25 testified that for seven (7) summers he has cleaned and rebuilt ditches
26 from the Mill Creek drainage down through the Thayer Ditch. Mr. Whitaker
27 further testified that in the seven (7) summers he has lived in the
28 area, there has been no water, high water, or excess water after about

1 the first of September, and he has lost crops all seven years due to a
2 shortage of water. Under cross-examination by Arlin Krogstad, Mr.
3 Whitaker testified that he diverts water from the end of April to approximately
4 September 15.

5 8. Mr. George Goodrich testified on behalf of his clients, Mr.
6 Zens; Mr. and Mrs. Mytty; Mr. and Mrs. Blair; and Mr. and Mrs. Skibsted.
7 His clients possess water rights which were decreed in June of 1937 in
8 the Case of Warden vs. Anderson in Cause No. 12336, Missoula, County,
9 Montana. Mr. Zens has a decreed right from Mill Creek with a priority
10 date of June 1, 1886 for a total flow of 100 miner's inches. Mr. Blair
11 and Mr. Mytty share a decreed right for 67 1/2 miner's inches from Mill
12 Creek, also with a priority date of June 1, 1886. Mr. Goodrich further
13 testified that the primary basis of his clients objections to this
14 Application is that there are no unappropriated waters in Mill Creek.
15 Mr. Goodrich testified that his clients feel that the Applicant has a
16 sufficient portion of the 40 inch Thayer right and that his clients
17 object to the issuance of any further permits for the appropriation of
18 water from Mill Creek.

19 9. Mr. Zens testified that there are 207 1/2 inches of decreed
20 water and that any water in excess of this decreed water is considered
21 high water. Mr. Zens stated that he's been using water since 1950, a
22 period of 30 years, and that he has a good understanding of when the
23 water is high and when it is low. He stated that generally there's high
24 water for approximately one (1) month and then there is usually another
25 month in which there is sufficient water to satisfy decreed rights, but
26 towards the end of July, there's only about 100 inches of water left in
27 the whole creek. Mr. Zens stated that by the end of July, generally
there is not sufficient water in the creek to satisfy the decreed rights

1 and that out of the 100 inches of water that may be available, he and
2 Mr. Blair and Mr. Mytty only receive about 50 inches of that water even
3 though their right says that they are entitled to 167 1/2 inches. Mr.
4 Zens stated that he and Mr. Blair and Mr. Mytty start using the water in
5 April and use it at least until the end of August and maybe even into
6 September. Mr. Zens stated that he irrigates about 50 acres of cropland
7 and when water is available he irrigates some pastureland also.

8 10. Mr. Mytty testified that he and Mr. Zens and Mr. Blair all use
9 the same point of diversion from Mill Creek. They have a headgate off
10 of Mill Creek which drops the water into a cistern and from there they
11 divert out of the cistern with a pipe into their irrigation systems.
12 Mr. Mytty stated that although they do use water from April to August
13 for irrigation, that they (Messrs. Zens, Mytty and Blair) also water
14 stock using this water right so that the period of use is even longer
15 than that stated by Mr. Zens. Mr. Mytty stated that he irrigates about
16 45 acres.

17 11. Mr. Blair testified that he irrigates 18 acres of land.

18 12. Under cross-examination by Chris Swartley, Larry Brown testified
19 that he measured the flow in Mill Creek on August 13, 1979. Mr. Brown
20 testified that at the time he measured the flow in Mill Creek, there was
21 more water flowing down the Thayer Ditch than down the central channel
22 of Mill Creek. Mr. Brown did not observe whether there was any water
23 flowing into Lolo Creek from Mill Creek at that time.

24 PROPOSED FINDINGS OF FACT

25 1. The Applicant presented no evidence that there are unappropriated
26 waters in the source of supply at times when the water can be put to the
27 use proposed by the Applicant, in the amount the Applicant seeks to
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1 appropriate, or that throughout the period during which the Applicant
2 seeks to appropriate, the amount requested is available (underlined for
3 emphasis).

4 2. The Applicant presented no evidence that the rights of prior
5 appropriators would not be adversely affected.

6 3. The Applicant presented no evidence to show that the proposed
7 means of diversion or construction are adequate. The Applicant stated
8 that he does not intend to divert water from Mill Creek, but rather will
9 only take what comes down the Thayer Ditch.

10 4. The proposed use of water is a beneficial use.

11 5. The proposed use will not interfere unreasonably with other
12 planned uses or developments for which a permit has been issued or for
13 which water has been reserved.

14 PROPOSED CONCLUSIONS OF LAW

15 1. Section 85-2-311, MCA, 1979, states that "The Department shall
16 issue a permit if:

- 17 1. there are unappropriated waters in the source of supply:
- 18 a. at times when the water can be put to the use
- 19 proposed by the applicant;
- 20 b. in the amount the applicant seeks to appropriate; and
- 21 c. throughout the period during which the applicant
- 22 seeks to appropriate, the amount requested is
- 23 available;
- 24 2. the rights of a prior appropriator will not be adversely
- 25 affected;
- 26 3. the proposed means of diversion or construction are adequate;
- 27 4. the proposed use of water is a beneficial use;
- 28

1 water is diverted from Mill Creek into the Thayer Ditch.

2 Regarding new appropriations from the Thayer Ditch; the Department
3 can only grant a permit to appropriate water from a source of supply, in
4 this case, Mill Creek. Without a proper diversion structure on Mill
5 Creek, the amount of water flowing down the Thayer Ditch cannot be
6 regulated to protect prior downstream rights on Mill Creek.

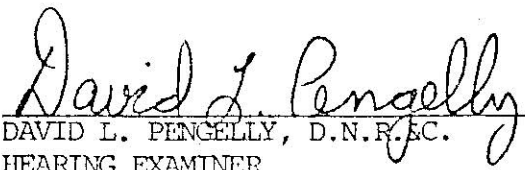
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8 NOTICE

9 This Proposed Order is offered for the review and comment of all
10 parties of record. The review and comment period shall commence with
11 the receipt of this Proposed Order and shall end ten (10) days thereafter.
12 No extensions of time for comment will be granted.

13 The Final Order in this matter will be sent to all parties by
14 certified mail.

15 The Hearing Examiner's Final Order may be appealed in accordance
16 with the Montana Administrative Procedures Act by filing a petition in
17 the appropriate court within thirty (30) days after service of the Final
18 Order.

19 DATED this 16th day of April, 1980.

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23 DAVID L. PENGELLY, D.N.R.&C.
24 HEARING EXAMINER
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